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SUPREME COURT OF THE UNITED STATES

October Term, 1968

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*

v.

MASONITE CORPORATION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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No. .....

SUPREME COURT OF THE UNITED STATES

October Term, 1968

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, ET AL., *Petitioners*

v.

MASONITE CORPORATION, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Mississippi

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this case on November 18, 1968.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi sought to be reviewed is reported at 215 So.2d 691; it is reprinted as Appendix A hereto. The two opinions of the Chancery Court of Jones County, Mississippi, are unreported; they are reprinted as Appendix B and C hereto. The first two opinions of the Supreme Court of Mississippi are reported at 202 So.2d 41 and 206 So.2d 171; they are reprinted as Appendix D and E hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Mississippi sought to be reviewed were entered on November 18, 1968. By order of Mr. Justice Brennan entered on February 12, 1969, the time for filing a Petition for a Writ of Certiorari in this Court was extended to March 3, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Where the parties are subject to the National Labor Relations Act, 29 U.S.C., §§ 141-87, can a state court enjoin peaceful strike activity by a labor organization because it concludes that such activity is in breach of a collective bargaining contract within the meaning of 29 U.S.C. § 185?

2. Where the parties are subject to the National Labor Relations Act, 29 U.S.C. §§ 141-87, can a state court enjoin peaceful strike activity by a labor organization when there is substantial argument and evidence that the strike was caused by employer unfair labor practices within the meaning of 29 U.S.C. § 158?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional and statutory provisions involved are lengthy; they are reprinted as Appendix F through H hereto. Included are the Commerce Clause, Art. I, Sect. 8, cl. 3, the Supremacy Clause, Art. VI, cl. 2, and Amendment XIV, § 1, to the Constitution of the United States; Sections 1-9 of the Norris-LaGuardia Act as amended, 29 U.S.C. §§ 101-09; and Sections 7, 8(a)(1), 8(a)(3), 8(a)(5), 13 and 301 of the National Labor Relations Act as amended, 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(a)(5), 163, 185.

STATEMENT OF THE CASE

The respondent Masonite Corporation (hereinafter "the employer") manufactures hardboard in Laurel, Mississippi (R. 10-11). In a representative year, it ships $60,000,000 worth of Laurel products over the world, buying and selling, respectively, over $50,000 worth of material to and from points outside the State of Mississippi (R. 37-38).[1]

The petitioners include international and local labor organizations (hereinafter collectively "the union")[2] which represent a collective bargaining unit of over 2000 production and maintenance employees of the respondent at the Laurel plant (R. 80).

The parties have had a bargaining relationship for over twenty years (R. 11 [Ex. A, p. 4]). The current contract, effective for at least three years beginning March 3, 1967, is an extensive catalog of rights, benefits, and duties (R. 11 [Ex. A]). Complaints of its violation must be processed through a grievance procedure ending in binding arbitration (R. 11 [Ex. A, pp. 59-61]). The union is forbidden to strike and the employer to lockout; employees who participate in work stoppages are subject to discharge without access to grievance procedures (R. 11 [Ex. A, pp. 54-55]).

Beginning in 1966, the employer sought a major overhaul of its production processes by which jobs of unit em-

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[1] These facts bring the employer within jurisdiction of the National Labor Relations Board. Siemons Mailing Service, 122 N.L.R.B. 81 (1958).

[2] See R. 74-75. The entire record reveals that the unions are "labor organizations" within the meaning of the National Labor Relations Act. 29 U.S.C. § 152(5). The individual petitioners are principal officers of Local 5-443, signatories to the current contract (R. 10-11).

ployees would be substantially affected (R. 177-78, 181). It was proposed, for example, that traditional duties be reassigned from some classifications to others across departmental lines, as such categories are delineated by the contract (R. 182-85). The original proposals were rejected by the union, and no mention of them was made by the employer during the negotiations which led to the March 3, 1967, contract (R. 483-87, 542-44).

Shortly after execution of that contract, the employer announced definite plans for sweeping changes (R. 544-46). The union reaffirmed its opposition; the issue accelerated to major proportions. After unilateral imposition, the intensity of the dispute indicated the possibility of a strike; the employer retained a private guard service on about April 12 (R. 111, 197-200).

On April 21, 1967, the conflict exploded into a strike, triggered by discharge that day of a union job evaluation official (R. 109-13). Virtually the entire bargaining unit complement participated (R. 166-71).

Within its first weeks, five major legal actions were generated by the strike. Chronologically:

> (1) on April 22 the employer filed an action against the union and the strikers in a state court seeking an injunction against all strike activity, and specifically against violence, restriction of ingress and egress, and similar breaches of the peace;[3]
>
> (2) on April 25 the employer filed an action against the union in a federal district court seeking damages of $130,000 plus $25,000 for each day the strike con-

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[3] R. 71. Masonite Corp. v. International Woodworkers of America, AFL-CIO, Jones County (Miss.) Chanc. Ct., No. 21,693. Without opposition from the union, a broad temporary injunction was issued against violence and other breaches of the peace (R. 1424B-D). It remains in effect at this writing.

tinued, alleging violation of the collective bargaining contract;[4]

(3) on May 1 the employer filed the instant action against the union and the strikers in a state court seeking an injunction against all strike activity, alleging violation of the collective bargaining contract;

(4) on May 17 the union filed a charge against the employer before the National Labor Relations Board, alleging that the strike was caused by the employer failing to bargain in good faith and that the strikers were protected unfair labor practice strikers under 29 U.S.C. § 158(a)(1), (3), and (5);[5] and

(5) on May 29 the employer filed a charge against the union before the National Labor Relations Board, alleging that the union failed to bargain in good faith and was responsible for strike misconduct under 29 U.S.C. § 158(b)(1) and (3).[6]

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[4] R. 147. Masonite Corp. v. International Woodworkers of America, AFL-CIO, U.S.D.C., S.D.Miss., Civil Action No. 2183. Upon motion of all parties reciting settlement of certain strike issues, the suit was dismissed by Order dated February 19, 1968. However, the employer seeks to reassert the damage claim against the union by cross-complaint in Jolly v. Gorman, U.S.D.C., S.D. Miss., Civil Action No. 2283, a pending proceeding involving collateral issues.

[5] See R. 1424J-K. Masonite Corp., NLRB Case No. 15-CA-3081. By letter dated June 30, 1967, the Regional Director for the Fifteenth Region of the National Labor Relations Board refused to issue a complaint on this charge. Although the Supreme Court of Mississippi recites this fact (R.Supp. 6), it fails to mention information furnished at the same time: appeal from the decision of the Regional Director was lodged with the General Counsel of the NLRB. See 29 U.S.C. § 153(d); NLRB RULES & REGS. § 102.19 (1968). Upon motion of the union reciting settlement of certain strike issues, the appeal was dismissed by the General Counsel on December 13, 1967.

[6] R. 144. Local 5-443, International Woodworkers of America, NLRB Case No. 15-CB-831. On July 12, 1967, the Regional Director issued a complaint alleging certain violations of § 158(b)(1) by Local 5-443, but refused to include the International or proceed

The instant complaint was filed in the Chancery Court of Jones County, Mississippi, on May 1, 1967 (R. 10-15). It alleged that the strike was "unlawful" as in violation of the no-strike clause of the contract,[7] and asked that the defendant union, its officers and agents "be restrained and enjoined from engaging in a strike . . ., from inducing or causing complainant's employees to strike . . ., [and] from engaging in picketing of complainant's plant in Laurel, Mississippi." Affirmatively, the court was asked to "order the defendants to . . . Advise all of their officers, agents and employees, and all other persons acting in concert with them of the contents of the court's order, and that the work stoppage . . . has been ended, and to direct each of their officers, agents and representatives employed by complainant . . . immediately to cease participating in the work stoppage and to return to work at their next scheduled work time" (R. 14-15).

Prior to responsive pleading, the Supreme Court of Mississippi took the first of several intervening actions. On May 1, the day the complaint was filed, the Honorable S. V. Robertson, Jr., Judge of the Supreme Court of Mississippi, issued a fiat directing the Chancery Clerk of Jones County to issue an injunction embodying the relief sought by the complaint, and summoning the defendants to appear in Jones County Chancery Court on June 12, 1967 (R. 16-17). The fiat was filed in Jones County at 8:05 a. m. on May 2, and the injunction papers served later that same day (R. 17).

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on the § 158(b)(3) allegations of the charge. On November 5, 1967, an NLRB Trial Examiner issued a Decision upholding certain allegations of the complaint, but dismissing others. TXD 648-67. Upon joint motion of the employer and the NLRB General Counsel reciting settlement of certain strike issues, the NLRB dismissed the entire complaint on January 8, 1968.

[7] The complaint in the instant case contains no allegation of violence or other breaches of the peace; the only conduct in the "unlawful strike" to which it makes reference is calling the employees out on strike and picketing (R. 11-14).

In an answer filed June 7, the union responded that the strike was the result of unfair labor practices by the employer in refusing to bargain with the union, subversion of the grievance procedure, and an attempt "to force numerous and material changes in said bargaining agreement upon defendants without negotiation all as part of a preconceived design or plan on the part of the" employer (R. 26-27).

The answer cited several other legal actions affecting jurisdiction. The pending federal damage suit was an adequate remedy at law (R. 29). The previous chancery action filed April 22 involved the same subject matter (R. 30). The parties had filed charges against each other before the National Labor Relations Board, thereby recognizing its exclusive jurisdiction (R. 30). Generally, the "subject matter of this suit has been pre-empted by Federal Statute, particularly the National Labor Relations Act" (R. 30). It also was asserted that an injunction would violate the First and Fourteenth Amendments to the Constitution of the United States (R. 29-30).[8]

Extensive evidence was received from June 13 through 22 on the issues in the collective bargaining relationship which precipitated the strike, as well as conduct of the strikers (*e. g.*, R. 83-123, 482-506, 537-53).

On June 22, 1967, the Honorable J. Shannon Clark issued a Final Decree, followed by an opinion (R. 1424A-25, Appendix B, *infra*). In his review of the facts, the chancellor noted that the union did not object to the injunction against breach of the peace issued in the previous case. "There is no question in this proceeding about mass picketing, about violence, about interfering with the in-

[8] In a General Demurrer filed simultaneously, the union asserted that there "is no equity on the face of the bill," that this "Court has no jurisdiction of this cause," and that the "subject matter of this lawsuit has been pre-empted by federal statute, particularly the National Labor Relations Act" (R. 34-35).

gress or egress to and from the premises for the simple reason that that is covered by another injunction issued out of this court on the 24th day of April, 1967" (R. 1424E).

The question of the right to picket peacefully, the court observed, depends upon the legality of the strike. Relying on *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959): "in order to determine whether or not it is a legal or an illegal strike, this Court must first determine whether or not the complainant has been guilty of unfair labor practices. That is the difficulty that this Court then runs into because the National Labor Relations Board has been designated by the Congress to decide this issue" (R. 1424G).

The court distinguished *Smith v. Evening News Assn.*, 371 U.S. 195 (1962), referring to the Supreme Court suggestion of those "situations in which serious problems will arise from both the courts and the board having jurisdiction over acts which amount to an unfair labor practice" (R. 1424J). Because the court was "of the opinion that it does not have jurisdiction of this suit," the complaint was dismissed (R. 1424K, 1425).

The employer returned immediately to the Supreme Court of Mississippi,[9] seeking an injunction pending ap-

[9] A concurrent proceeding involved contempt of the May 2 injunction (206 So.2d 171, Appendix E, *infra*; see R. 1424B). On May 4, the employer sought a citation against all defendants. It was tried on May 18 and 19, Chancellor Clark holding that "Masonite has not sustained the burden of proof and that the charge of contempt should be . . . dismissed finally, at the cost of complainant." 206 So.2d at 177. The employer appealed to the Supreme Court of Mississippi, which held that appeal from acquittal of criminal contempt does not lie. As to civil contempt, however, the dismissal was reversed. The Supreme Court found it "incredible to think that 2,050 men would stay out on strike, after the injunction was served on the union and its officers, without leadership from the unions." 206 So.2d at 182. The matter was remanded

peal (Appendix D, *infra*). On July 10, 1967, that court denied the application as procedurally improper; a writ of supersedeas was held necessary under Mississippi practice.[10]

Employer application for supersedeas in the chancery court resulted in further consideration of federal questions. Chancellor Clark denied the writ with an opinion filed July 24 (R. 1426-30, Appendix C, *infra*). Since his previous decisions, *Avco Corp. v. Aero Lodge 735, IAM*, 376 F.2d 337 (6th Cir. May 2, 1967),[11] had been reported. Relying on the reasoning of the Sixth Circuit in *Avco* (R. 1430), the chancellor dismissed the application.

The employer returned again to the Supreme Court of Mississippi for extraordinary relief. On July 24, 1967, the same day as the opinion of the Chancellor was filed, the Honorable W. N. Ethridge, Chief Justice, issued a Fiat Granting Application for Writ of Supersedeas (R. 1454-55). Upon posting of a bond by the employer, the strike was enjoined through the decision issued November 18, 1968 (R. 1456).

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for enforcement of "the judgment and injunction" against the unions and the five principal officers of the local because they were the "responsible officers and leaders" as "sigratories to the collective bargaining contract." 206 So.2d at 182, 184. In that proceeding, the Supreme Court of Mississippi did not "consider the issue of whether a state court may properly grant injunctive relief against a union's violation of a no-strike clause." 206 So.2d at 183.

[10] As dictum (R. 1429-30), the Supreme Court stated: "Upon consideration of all aspects of the proceedings we are of the opinion that the temporary injunction which was in force until Masonite's bill of complaint was dismissed, and which injunction was necessarily dissolved by said dismissal, should be kept in force until this Court decides the appeal on its merits." 202 So.2d at 42.

[11] The result, but not all of the reasoning of the Sixth Circuit, was affirmed in Avco Corp. v. Aero Lodge 735, IAM, 390 U.S. 557 (1968).

Finally considering the merits of the lower court dismissal, the Supreme Court of Mississippi, speaking through the Honorable Tom P. Brady, Justice, reversed and made the injunction against the strike permanent for the term of the collective bargaining agreement (R. Supp. 1-23, Appendix A, *infra*).

The court noted other legal proceedings growing out of the dispute (R.Supp. 3-6). Two federal questions received extensive consideration:[12]

> [1] Does a state court have jurisdiction to hear a case where unfair labor practices are alleged to have been committed in violation of a collective bargaining contract or has the field been preempted by either the federal courts, under Section 301 of the Labor-Management Relations Act, 29 U.S.C.A. § 185(a) (1964), or by the National Labor Relations Board, under the National Labor Relations Act (R.Supp. 6) . . . . [and 2] whether the anti-injunctive provision of the Norris-LaGuardia Act is applicable to state courts (R.Supp. 10).

The court concluded that no federal statute impaired its power to apply traditional Mississippi law. As to the argument of the union that uniformity is desirable in cases within the cognizance of Section 301, Justice Brady opined:

> Uniformity seeks to press into a common mold the natural, evolutionary concepts and interpretations of state and federal law as is evident in the diversity of interpretation of laws dominant in the United States District and Circuit Courts of Appeal. Uniformity, when carried to its ultimate, produces stereotyped sterility in the interpretation of state and

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[12] The evidentiary question in the Supreme Court of Mississippi (R.Supp. 18) is abandoned by the petitioners herein.

federal laws the quintessence of which is classically exhibited by the absolute congruity of Soviet jurisprudence. . . . Moreover, while logic has its place in law and in numerous other realms of human self-regulation, nevertheless hypothetical, syllogistic conclusions are not the prudent, judicious means whereby a fair and just interpretation of the law has been and can be determined. Injunctive relief for the enforcement of contracts is available in Mississippi (R.Supp. 15-16).

REASONS FOR GRANTING THE WRIT

1. A. Under compelling combination of decisions of this Court, the Supreme Court of Mississippi does not have power to enjoin a breach of contract strike even assuming that the strike activity is unprotected under the National Labor Relations Act. Most simply, federal law controls, uniformity is essential, and federal law forbids judicial injunctions against breach of contract strikes.

The parties and their contract clearly are within the ambit of Section 301.[13] 29 U.S.C. § 185. Controlling principles for its application originated with *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). "[T]he substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456. Federal statutes furnish primary policy guidance.

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[13] "The complaint does not expressly refer either to § 301 (a) of the Labor Management Relations Act or to the National Labor Relations Act as the source of the action. Since substance and not form must govern, however, we look to the allegations of the complaint and to the federal labor statutes to determine the nature of the claim." Humphrey v. Moore, 375 U.S. 335, 352 (1964) (concurring opinion).

State courts may entertain suits for violation of contracts within the meaning of Section 301. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). But in doing so, they are compelled to follow principles of federal law. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). "[T]he subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.'" 369 U.S. at 103.

Not only "substantive" issues require uniformity. "[S]ince remedies form an ingredient of any integrated scheme of regulation" (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)), and procedural rules "themselves dig into 'substantive rights'" (*Brown v. Western Railway*, 338 U.S. 294, 296 (1949)), the procedure by which a right is realized and the remedy by which it is vindicated may be more important than its substantive definition. This is particularly true of a strike injunction, in which the timing of a temporary order may control the economic results of the strike.[14]

Since the choice of forum must not determine the result of a Section 301 injunction action, the question is resolved by *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962). The Court defined the issue to be whether Congress intended, by Section 301, to repeal restrictions on injunctions established in 1932 by the Norris-LaGuardia Act. 29 U.S.C. § 101-15. Nothing was found to indicate 1947 repeal, par-

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[14] *Cf.* Local 20, Teamsters Union v. Morton, 377 U.S. 252 (1964). Lincoln Mills, where the sources of Section 301 law first were articulated, involved a "remedy" in the same sense as an injunction. Perhaps the only holding that uniformity is not controlling was International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), as to statutes of limitations. "Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy." 383 U.S. at 702. Historic federal concern surely accords governmental attitude towards injunctions in labor disputes the status of a "significant goal of labor policy." See Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91, 102 (1940).

ticularly in view of the strong federal policy against injunctive abuses which Norris-LaGuardia represents. "The argument to the contrary seems to rest upon the notion that injunctions against peaceful strikes are necessary to make the arbitration process effective. But whatever might be said about the merits of this argument, Congress has itself rejected it." 370 U.S. at 213.

Summary assistance to the employer provided by the Supreme Court of Mississippi throughout this case, juxtaposed against federal policy on abuse of the injunctive process, adds color to application of the syllogism.[15] In any event, the logic of the *Lincoln Mills—Lucas Flour—Sinclair* combination compels reversal of the judgment below. See Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 COLUM. L. REV. 1027 (1963).[16]

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[15] "If state courts can enjoin strikes, suits for violation of the no-strike clause will flock to the state courts. Federal substantive law will be fashioned in the first instance by the state courts, many of which have not proven themselves hospitable to, or even aware of, national labor policy. As random writs bring disparate decisions to the Supreme Court, it will bear the burden of fashioning and enforcing this segment of federal law, unaided by the instructive opinions of lower federal courts." Summers, *Labor Law Decisions of Supreme Court 1961 Term,* in PROCEEDINGS, SECT. OF LABOR REL. LAW, ABA, 1962, 51, 63.

[16] See also Avco Corp. v. Aero Lodge 735, IAM, 376 F.2d 337 (6th Cir. 1967), *aff'd.,* 390 U.S. 557 (1968); American Dredging Co. v. Local 25, IUOE, 338 F.2d 837, 857-58 (3d Cir. 1964) (dissent by Hastie, J.), *cert. denied,* 380 U.S. 935 (1965); McCarroll v. Los Angeles Dist. Carpenters, 315 P.2d 322, 336-39 (Calif. 1957) (dissent by Carter, J.), *cert. denied,* 355 U.S. 932 (1958); Shaw Electric Co. v. IBEW, 208 A.2d 769, 777-80 (Pa. 1965) (dissent by Cohen, J.); Independent Oil Wkrs. v. Socony Oil Co., 205 A.2d 78 (N.J.Super. 1964); Tidewater Express Lines, Inc. v. Freight Drivers, 187 A.2d 685 (Md.Ct.App. 1963); Ratner, *The Emergent Role of District Courts in National Labor Policy,* 17 LAB. L. J. 36, 42-43 (1966).

1. B. Extension of the *Sinclair* principle to state courts would not erode its rationale. Rather, federal policies would be served in a manner which removal techniques fail to satisfy.

Permitting state but not federal courts to determine complicated contractual and statutory questions threatens the entire structure of the national labor policy.

> For example, at the threshold there would be involved the question of whether the contract *in haec verba* does contain a "no strike" clause and, if not, whether a pledge not to strike should be "implied," surely an awesome power to be confided to the . . . courts. The "no strike" clause may be a very limited one, and may not apply to all grievances. Not all disputes may be covered by the grievance procedure. There may have been a substantial breach by the employer leading to the right of recission by the Union or the release of the union from the no-strike clause. The employer may have rescinded, thereby releasing the union. There may have been the commission of a substantial unfair labor practice by the employer. The strike may be protected by Section 502 of the Taft-Hartley Act. Indeed, the question may arise as to whether the action itself is in fact or law a strike. The employer may have condoned the strike. The contract containing the no-strike clause may be illegal because made by illegally supported and dominated unions. Finally, in many instances, an application for an injunction against a strike alleged to be in violation of a contract, and on a matter alleged to be arbitrable under the terms of the contract, requires the Court to determine in the first instance whether there is a breach of contract and whether the dispute is arbitrable, although the parties have confided the right to make determinations to the arbitrator.

Report of Special Atkinson-Sinclair Committee, in PROCEEDINGS, SECT. OF LABOR REL. LAW, ABA, 1963, 226, 235-36 (Report of Labor Members; citations omitted).

The employer is not without effective remedy. Its damage suit, seeking eventually millions of dollars, was filed four days after the strike began. Its NLRB charge created the possibility of a Section 10(j) injunction application. 29 U.S.C. § 160(j). An injunction against violence and breaches of the peace was issued shortly after the strike began.

As collective bargaining and case law under *Sinclair* develop, effective alternatives to traditional injunctions, more consistent with the national labor policy, have become apparent.[17] Most significant, "quickie arbitration" systems are being negotiated by which contract tribunals can issue prompt awards forbidding strike activity.[18] Such result accommodates Norris-LaGuardia and Section 301 to a realistic degree.

> [T]here are several highly significant differences between arbitration and direct judicial intervention: The original authority of an arbitrator derives from the consent of the parties, not governmental compulsion, and therefore his authority is not subject to the potential abuses against which the Norris-

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[17] See, *e.g.,* Tanker Service Committee, Inc. v. International Org. of Masters, Mates & Pilots, 269 F.Supp. 551 (E.D.Pa. 1967); In re Ruppert, 148 N.E.2d 129 (N.Y.Ct.App. 1958). Even critics of the Sinclair principle believe that judicial injunctive power in contract disputes should be limited to some degree by the national labor policy. See Loeb, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes,* 11 LAB. L. J. 473 (1960); Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia,* 79 HARV. L. REV. 757 (1966).

[18] *High Speed Arbitration Systems Developed for Quick Relief in Strikes and Contract Violations,* Arbitration News, No. 1 (Amer. Arb. Assn., Jan., 1969).

> LaGuardia Act was aimed; and, furthermore, the arbitrator is able to fix his remedies to the particular context of the industrial relations of the parties.

Givens, *Section 301, Arbitration and the No-Strike Clause,* 11 LAB. L. J. 1005, 1014 (1960).

Enforcement of arbitral strike bans has been distinguished from *Sinclair. E.g., New Orleans Steamship Assn. v. General Longshore Wkrs.,* 389 F.2d 369 (5th Cir. 1968), *cert. denied,* 69 L.R.R.M. 2434 (1968); *Philadelphia Marine Trade Assn. v. International Longshoremen's Assn.,* 365 F.2d 295 (3d Cir. 1966).[19]

Such alternatives, developed through viable collective bargaining and judicial recognition of federal labor policies, are in stark contrast to the reasoning of the Supreme Court of Mississippi[20] of which review is sought.

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[19] See Philadelphia Marine Trade Assn. v. International Longshoremen's Assn., 368 F.2d 932 (3d Cir. 1966), *revd. on other grounds,* International Longshoremen's Assn. v. Philadelphia Marine Trade Assn., 389 U. S. 64 (1967). But *cf.* Gulf Steamship Co. v. National Maritime Union, 360 F.2d 63 (5th Cir. 1966); Marine Transp. Lines, Inc. v. Curran, 65 L.R.R.M. 2095 (S.D. N.Y. 1967).

[20] State legislation establishing Norris-LaGuardia policies receives similar judicial treatment. For example, the most recent decision cited by the Supreme Court of Mississippi is Rust Engineering Co. v. United Bro. of Carpenters, 210 So.2d 154 (La.Ct. App. 1968). The court chose to follow American Dredging rather than Avco on the federal issue. As to the Louisiana "Little Norris-LaGuardia Act," it "appears well settled now . . that whenever there is a property right involved, an injunction will lie to prevent injury." 210 So.2d at 160. The report contained no mention of physical damage to property; the injunction stopped all picketing. Cancellation of such state legislation through a doctrine of "property rights" arose in Godchaux Sugars, Inc. v. Chaisson, 78 So.2d 673 (La. 1955), *vacated and remanded sub nom.* Chaisson v. Southcoast Corp., 350 U.S. 899 (1955), in which the Supreme Court of Louisiana had enjoined a strike of agricultural workers for the sole reason that it took place during the harvest season.

1. C. The writ should be granted because the power of state courts to enjoin breach of contract strikes involves a federal question of substance repeatedly reserved by this Court.

The Court expressly refrained from intimating any view on the issue in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). "The relation of the Norris-LaGuardia Act to state courts applying federal labor law has never been decided by this Court." 368 U.S. at 514, n. 8. The problem was recognized in the dissenting opinion in *Sinclair Refining Co. v. Atkinson, supra*, 370 U.S. at 226. In *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), after noting the *Sinclair* result in federal courts, the Court commented: "Whether a state injunction might be similarly barred in suits governed by federal labor law . . . is an open question." 385 U.S. at 429-30, n. 15.

Major expressions of the reservation appeared last year in *Avco Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968). It was found "unnecessary to rule on the holding of the Court of Appeals below that 'the remedies available in State Courts are limited to the remedies available under Federal law,' " with specific reference to Norris-LaGuardia. 390 U.S. at 560, n. 2. See also 390 U.S. at 561, n. 4; 390 U.S. at 562 (concurring opinion).

Seven years of reservation have produced understandable divergence in reasoning of federal and state courts.[21] A writ in this case could answer this important open question.

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[21] See cases at note 16, *supra*; Spelfogel, *Enforcement of No-Strike Clause by Injunction, Damage Action and Discipline*, 17 LAB. L. J. 67, 68-72 (1966); Committee on Law and Legislation, Natl. Acad. of Arbitrators, *Arbitration and Federal Rights Under Collective Agreements in 1967*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, 201, 218-19 (1968).

2. Independently, the Mississippi result is not in accord with applicable decisions of this Court. The conduct enjoined arguably was controlled by Sections 7, 8 and 13 of the amended National Labor Relations Act, 29 U.S.C. §§ 157, 158, 163. Thus not only federal law, but a federal forum, the National Labor Relations Board, are exclusive.[22]

The massive state court record details the nature of the employer violations of its Section 8(a)(5) duty to bargain in good faith.

The employer changed organization of the plant in a manner which substantially affected wages, hours, and working conditions of the unit employees. Job classifications were radically revised. See *Latin Watch Case Co.*, 156 N.L.R.B. 203, 208 (1965); *Mooney Aircraft, Inc.*, 138 N.L.R.B. 1331, 1337 (1962). Portions of the program related to contract provisions; others did not. During negotiation of the March 3, 1967, contract, the employer failed to mention the changes; shortly after the contract was signed, they were instituted unilaterally. The practically inevitable strike which is the subject of this action followed.

Deliberate deception about a mandatory subject of bargaining, thereby inducing the other party to refrain from positions which might affect future changes in terms and conditions of employment, is an 8(a)(5) violation. *Royal Plating Co.*, 160 N.L.R.B. 990 (1966); *Cincinnati Cordage Co.*, 141 N.L.R.B. 72, 77 (1963).

Unilateral institution of the reclassification program prior to impasse and without meaningful bargaining also

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[22] Justice Brady referred repeatedly to evidence of "violence" although the complaint did not allege such conduct, it already had been enjoined, and the trial court found it immaterial. In any event, there was no conceivable enmeshment from which jurisdiction to enjoin peaceful strike activity could arise. See Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).

was inconsistent with 8(a)(5) obligations. The contract here, as in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), excepted some issues thereby created from binding arbitration. Here too, "the history of negotiations between the parties, as well as the express provisions of the collective agreement" demonstrate that "the union had not ceded power to the employer to change the wage system as it had." 385 U.S. at 424-25.

C & S Industries, Inc., 158 N.L.R.B. 454 (1966), establishes a third principle violated here. Nonconsensual changes in the collective agreement are interdicted by the Section 8(d) definition of good faith bargaining. 29 U.S.C. § 158(d). "[W]here an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment . . . more is involved than a simple default in a contractual obligation." 158 N.L.R.B. at 458. See also *Huttig Sash Co.*, 154 N.L.R.B. 811, 814-17 (1965).

The significance of these violations is that the strike which they caused is "protected activity" under the N.L.R.A., the no-strike contract notwithstanding. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). If employee conduct is arguably protected by the Act, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

Mastro and *Garmon* were followed expressly by the trial court. Faced with an extensive record in which complicated 8(a)(5) principles were asserted, Chancellor Clark deferred to the expertise of the National Labor Relations Board.[23]

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[23] Under Smith v. Evening News Assn., 371 U.S. 195 (1962), there is concurrent jurisdiction over some conduct which is both

Substantial argument and evidence support conclusions that the employer committed unfair labor practices, which caused the strike. In any event, such determinations are for the National Labor Relations Board. The trial court honored this congressional intention. The Supreme Court of Mississippi did not.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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a breach of contract and an unfair labor practice. But there neither right would be diminished by invocation of the other, whereas here the Section 301 injunction irrevocably decimated arguable Section 7 rights. The trial court below considered this to be one of those "situations in which serious problems will arise from both the courts and the Board having jurisdiction," about which this Court indicated some reservation. 371 U.S. at 197-98.